

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

DROPLETS, INC.

DOCKET NO. 2:11CV401

VS.

JANUARY 8, 2015

1:06 P.M.

EBAY, INC., ET AL

MARSHALL, TEXAS

VOLUME 1 OF 1, PAGES 1 THROUGH 55

REPORTER'S TRANSCRIPT OF FINAL PRETRIAL CONFERENCE

BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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1 (OPEN COURT, ALL PARTIES PRESENT.)

01:06PM

2 THE COURT: For the record, we're here to
3 complete the Final Pretrial Conference in *Droplets versus*
4 *Overstock.com and Sears*, which is Case 2:11-401 on our
5 docket.

6 Would counsel state their appearances for the
7 record.

01:06PM

8 MR. BUDWIN: Your Honor, Josh Budwin with
9 McKool Smith on behalf of plaintiffs. With me is James
10 Quigley and Jenna Albert.

11 THE COURT: All right. Thank you, Mr. Budwin.

01:07PM

12 MS. SMITH: Good afternoon, your Honor.
13 Melissa Smith on behalf of defendants. I'm joined by our
14 lead counsel Mr. John Barr and his partner Mr. Chris
15 Shield. And I believe we are ready to proceed, your
16 Honor.

17 THE COURT: All right. Thank you, Ms. Smith.

18 MS. SMITH: Thank you.

01:07PM

19 THE COURT: Let me see. I just want to --
20 before we get onto the primary agenda, which is the
21 deposition designation objections, I want to make sure
22 that we don't have any issues regarding the exhibit
23 lists.

01:07PM

24 MR. BUDWIN: Thank you, your Honor. My
25 understanding is we're squared away on the exhibit lists.

1 I'm not aware of any outstanding issues from either side.

2 THE COURT: All right. So, you have -- I've
3 got a copy of Plaintiff's Ninth Amended Trial Exhibit
4 List. And defendants agree that that's an accurate
5 recitation of the status of those exhibits?

01:07PM

6 MR. SHIELD: Yes, your Honor.

7 THE COURT: And, Mr. Budwin, you have seen the
8 defendants' most recent amended trial exhibit list?

9 MR. BUDWIN: Yes, your Honor. I believe it
10 was filed or was going to be filed soon. I think we saw
11 it and we approved it, but maybe it hasn't been filed
12 yet.

01:07PM

13 THE COURT: All right. As long as you are in
14 agreement with its contents, then we're good on that.

01:08PM

15 I noticed there are a few items that were
16 carried last time, and those -- we'll get a written
17 ruling out on those promptly.

18 So, is there anything else besides the
19 deposition designations that the plaintiff thinks we need
20 to take up today?

01:08PM

21 MR. BUDWIN: That's all I'm aware of, your
22 Honor.

23 THE COURT: Mr. Shield, on your side? Or
24 Mr. Barr?

01:08PM

25 MR. BARR: Sorry, your Honor. There was just

1 one issue, and I don't think it's really an issue. I was
2 wondering if the parties play video depositions at trial,
3 is it okay to have the transcript show up at the bottom
4 of the video?

01:08PM

5 THE COURT: You know, that -- I find that
6 that's helpful to the jury. The only real question would
7 be is whether there's some issue about whether it's an
8 accurate depiction of what's in the transcript. And
9 if -- but unless there's an issue about the accuracy of
10 it, I think that the court would appreciate that.

01:09PM

11 MR. BARR: All right. At least one of our
12 witnesses has an accent, and it would be easier for
13 everyone probably for it being read while spoken.

01:09PM

14 THE COURT: And I'm assuming that what would
15 play up there is out of the certified deposition
16 transcript.

17 MR. BARR: Yes, sir.

18 THE COURT: So, in that case, there should be
19 no issues.

01:09PM

20 MR. BUDWIN: We agree, your Honor. There's no
21 issues with that.

22 THE COURT: All right. Good. Thank you.

23 All right. Then, Mr. Budwin, if you want to
24 address your objections to their deposition designations;
25 and then I'll give them a chance to take the lead with

01:09PM

1 respect to their objections.

2 MR. BUDWIN: Thank you, your Honor.

3 One point of clarification briefly is, you
4 know, there have been several back-and-forths between the
5 parties on designations and meet and confers and further
6 narrowing. We received the most recent narrowing from

01:09PM

7 the defendants from what was a substantial volume of
8 testimony and is still a relatively large volume of
9 testimony late last night, and our team was busy working

01:10PM

10 with that -- there was a joke about Mr. Quigley sending
11 e-mails at 5:00 o'clock this morning to Mr. Barr related
12 to it -- right up to the time of the hearing. Our
13 paralegals are actually still printing the transcripts,
14 and we hope to have some of them brought over. It's been

01:10PM

15 a lot of work dealing with the cut-downs that were made
16 to the deposition objections and designations. And what
17 I would ask and see if we can have agreement on is that
18 the testimony that's designated after today and has been
19 ruled upon is the testimony that will be played. Because

01:10PM

20 what we had before was defendants had designated a large
21 number -- let's say a couple of pages in a row and then
22 they cut their designations so it was only a portion of
23 that. We had to go back this morning and

01:10PM

24 counter-designate some of that because we thought it was
25 needed for completeness or whatever. And if there's

1 further cut-downs, we're concerned that we're going to
2 have this substantial time crunch again dealing with
3 responding to those cut-downs.

01:11PM 4 So, what I would propose is it's either you're
5 going to play everything that's deemed designated and
6 accepted at this point unless the parties agree to
7 further cut-downs; but if there's no agreement to the
8 further cut-down, then each party should have to play the
9 sum total of what's designated after the hearing today.

01:11PM 10 MR. BARR: Your Honor, if I could address
11 that. First of all, I think I'll say that I think it's
12 fair that both sides worked very hard on this and there
13 was substantial back and forth and reductions on both
14 sides and both sides worked late into the night, which is
01:11PM 15 how I knew that Mr. Quigley was sending e-mails early
16 this morning.

17 THE COURT: I assume that that's correct.

01:11PM 18 MR. BARR: But secondly, your Honor, we don't
19 agree with this proposal because obviously I think the
01:11PM 20 plaintiffs should have to designate whatever testimony
21 they want to play now and that would include things that
22 would be respondent to things that we would play if we're
23 going to play that testimony that needs to be optionally
24 complete or responded to. Obviously as this case
01:12PM 25 proceeds, especially since we're the defendants and we go

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1 second, we may have to cut people's time based on how
2 much time we have left, based on how much time the live
3 witnesses take, and I don't think that the plaintiffs
4 should be able to say that the witnesses of the
5 defendants that we -- as of right now we have to make our
6 decision as to who we're going to put on and how much
7 time they're going to spend. We should be able to manage
8 our case as we need to as it goes along. If they want to
9 play something in their case, they can play whatever they
10 want in their case.

11 THE COURT: Well, I will agree with you with
12 two footnotes. One, if there is an indication that
13 either side is overdesignating by any considerable amount
14 in order to sort of hide the ball, then that's an issue
15 that we can address but -- I'm not hearing that at this
16 point but if you -- if either side thinks they can show
17 that, then that's something for which the court might
18 have a remedy.

19 And the other thing would be I think we need
20 to build in a time schedule with respect to the
21 designations so that if either party decides to
22 significantly alter what they had previously designated,
23 that the other side will have a chance to look at it and
24 decide whether or not they think that under the rule of
25 completeness they need some part of that in. Maybe we've

1 already got that established.

2 MR. BARR: I think we do, your Honor, have
3 that. And frankly -- and somebody correct me if I'm
4 wrong; but at least the depo excerpts I've seen, I don't
5 think any of them are longer than 15 or 20 minutes for
6 any particular witness. So, I don't think this is an
7 issue where we're going to have -- I mean, some of these
8 are like 8 minutes long. So, I don't think we're going
9 to have an issue of an hour's testimony has been

10 designated and now it's cut down to 5 minutes. I don't
11 think that's what we're talking about here.

12 THE COURT: Well, and that's fine.

13 If -- so, Mr. Budwin, tell me why -- why do
14 you feel that the schedule that's in place now in terms
15 of notice of the -- what's going to be offered to the
16 jury won't accommodate what you need?

17 MR. BUDWIN: Thank you, your Honor. We talked
18 about this at the first pretrial. And the schedule
19 that's presently outlined, which we objected to initially
20 but our objection was overruled, is that the
21 designations -- the final designations to be played will
22 be exchanged at 1:00 p.m. the day before they're going to
23 be played and objections by 6:00. The problem with that
24 is our trial team, including our lead paralegal and our
25 associates, are going to be in court during that time.

01:14PM

1 It's going to make it very difficult for us to respond to
2 substantial changes that are being made to those
3 designations, which is why we had originally proposed
4 building in more time, that designations would be
5 exchanged, you know, maybe by 5:00 p.m. the night before
6 they're going to be used with objections by 10:00 o'clock
7 that night, as opposed to the 1:00 p.m./6:00 p.m. during
8 court the day before.

01:15PM

9 THE COURT: Well, the -- so, you're talking
10 about 5:00 p.m. two days before.

01:15PM

11 MR. BUDWIN: Yes. So, right now it's
12 1:00 p.m. the day before. 5:00 p.m. two days before
13 would give us that night while we're not in court to deal
14 with any further changes and amendments. I mean, just
15 between what we got from the defendants last night until
16 now, it was, you know, five, six, seven hours of work for
17 the three attorneys sitting here and plus our staff; and
18 we're not going to be able to turn that around while
19 we're in trial, which is what we'd have to do under the
20 current schedule.

01:15PM

01:15PM

21 MR. BARR: Your Honor, this was an issue we
22 discussed at the first pretrial when they asked for, I
23 think, 48 hours before; and the problem is that we'd have
24 to designate before we even start -- long before we start
25 our case. This is only nine hours per side.

1 THE COURT: And I'm not inclined to make it --
2 your designations be due two days before, but one
3 possibility would be to give the receiving party a little
4 more time past 6:00 to note their objections.

01:16PM

5 MR. BARR: And that would be fine, your Honor.
6 I'm happy with -- how much time do you -- 10:00 o'clock?

7 MR. BUDWIN: If we could have until
8 10:00 o'clock -- we'll try to get them out earlier if we
9 can -- that would be better.

01:16PM

10 THE COURT: And if you can live with that,
11 then we'll just adjust it in that fashion.

12 MR. BARR: I'm getting some daggers from my
13 table over here.

14 How about 8:30? Would that be okay?

01:16PM

15 THE COURT: I mean, I do think that
16 10:00 o'clock is a little on the late side to be getting
17 the objections.

18 MR. BUDWIN: We agree to 8:30.

01:16PM

19 THE COURT: All right. Then we'll just adjust
20 the schedule to show that the time will be moved from
21 6:00 p.m. back to 8:30 p.m. for the party receiving the
22 designations to note any objections. And I assume that
23 would include any requests that additional matter be
24 included back in for completeness.

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25 MR. BUDWIN: Thank you, your Honor. How would

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1 the court like to handle that scenario? Which is some of
2 what we're going to have to deal with today but we'd have
3 to deal with down the line. I mean, for example, if
4 defendants currently have material designated that they
5 de-designate between now and when they're going to play
6 it and then we want to get some of it added, there's
7 probably going to be a dispute over whether it's a
8 completeness objection and it counts toward their time or
9 whether it's a counter and it counts toward our time and
10 that's, I think, a lot of what we're faced with here
11 today and frankly I don't want to be bothering the court
12 with that, you know, the morning of.

13 THE COURT: You know, other than the bothering
14 the court with it, I don't know what -- what would you
15 propose? I can say you'll flip a coin and...

16 MR. BUDWIN: I mean, my proposal would be
17 something like if it's designated now and a party
18 de-designates it and the other party wants to have that
19 material designated, that it should be presumptive as a
20 106, with the ability of the other party to rebut that if
21 they don't think it's actually a 106 completeness.

22 THE COURT: You know, obviously if -- you
23 know, that just changes which side will be playing games
24 with the time. I think that the best we can do is say
25 that you need to try and work it out; and if you can't

1 work it out, you can explain to Judge Gilstrap the
2 morning of the trial why you couldn't work it out.

3 MR. BUDWIN: Thank you, your Honor.

4 THE COURT: Okay.

01:18PM

5 MR. BUDWIN: So, I think with respect to our
6 objections -- or the defendants' objections to our
7 counters, Mr. Quigley is going to address those for our
8 side.

01:18PM

9 THE COURT: All right. This is -- we're going
10 to start off with your objections to the defendants'
11 designations.

12 MR. BUDWIN: If you want to start with our
13 objections to the defendants, that would be Ms. Albert --
14 no, sorry. Mr. Quigley. I got it right the first time.
15 I said it backwards.

01:18PM

16 THE COURT: All right. And, Mr. Quigley, just
17 to make sure we're all on the same page, I'm starting
18 with Document 343-2 which is entitled "Defendants'
19 Supplemental Deposition Designations"?

01:19PM

20 MR. QUIGLEY: I believe that's right. And
21 then the first witness within there is Matthew Baskin?

22 THE COURT: Yes.

23 MR. QUIGLEY: Yes, your Honor. I believe our
24 first two objections are completeness objections.

01:19PM

25 Sorry. Just to introduce Mr. Baskin, your

1 Honor, he is one of the inventors of the patents.

2 And the first objection, Mr. Diaz, if we can
3 have page 14, lines 2 through 11 on the screen. And if
4 you can blow up 2 through 11, help me see it.

01:20PM

5 So, defendants have now designated this
6 testimony, handing Mr. Baskin the patent. They
7 previously had designated lines 12 through 17 which we're
8 asking be included under the rule of completeness where

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9 Mr. Baskin simply explains -- I'm sorry -- his role in
10 drafting the patents. Has he seen the patent, what was
11 your role in drafting the patent is 12 through 17, which
12 is what we ask be designated under the rule of
13 completeness.

01:20PM

14 THE COURT: All right. Just so I can
15 understand the dynamics here, you're not objecting to
16 anything. You're just asking that the jury be shown
17 certain additional lines. And the reason you're framing
18 it as a 106 instead of as a counter-designation is
19 because you want the time to be counted against the
20 defendant?

01:21PM

21 MR. QUIGLEY: I think the -- we do want the
22 time to be counted against the defendants but the reason
23 is -- and I think we'll see this later with other
24 objections that we have with Mr. Baskin and the other
25 inventors -- is that a number of defendants' questions go

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1 towards the inventor's understanding of the patent
2 claims. And I think that when he's being handed the
3 patent and he's being asked what role he had in drafting
4 the patent, those questions are fairly considered
5 together.

01:21PM

6 THE COURT: Well, I can tell you my
7 inclination on these is to broadly allow you to have the
8 additional testimony played to the jury but to say that
9 I'm going to treat it timewise as a counter-designation
10 such that, you know, it would count on your time. If you
11 think it's important that the jury see it and they don't,
12 then I -- I think that that should be something that we
13 simply allow but count towards your time.

01:22PM

14 MR. QUIGLEY: Thank you, your Honor. With
15 that understanding, we'll actually drop, then, I believe
16 in our objections all of our 106 objections.

01:22PM

17 THE COURT: Which means that you don't believe
18 that --

19 MR. QUIGLEY: We think that our other 106
20 objections are similar to this 106 objection.

01:22PM

21 THE COURT: And, so, rather than
22 counter-designate it, you'll simply drop it?

23 MR. QUIGLEY: We're going to counter-designate
24 without the 106.

01:22PM

25 THE COURT: Okay. So, you -- all right. If

1 I'm understanding right, then, all of your 106 objections
2 would just be counter-designations.

3 MR. QUIGLEY: Correct, your Honor.

01:23PM

4 THE COURT: Okay. Mr. Shield and Mr. Barr, do
5 you -- with the understanding that they're going to be
6 part of the plaintiff's case timewise, do you have any
7 objection to that?

8 MR. SHIELD: No, your Honor.

9 THE COURT: Okay. What's next, Mr. Quigley?

01:23PM

10 MR. QUIGLEY: In Mr. Baskin's transcript, if
11 we could go to page 173, line 7. We're objecting to the
12 testimony beginning here, your Honor, and running through
13 line 21 of page 174, with some spaces in between on
14 there, of defendants' designation list. We believe that
15 these questions go towards claim construction. We
16 believe that the court construes the claims, not the
17 inventors, and the court here has construed the claims
18 and to the extent that defendants wanted additional claim
19 terms construed, they could have asked the court to do
20 so.

01:24PM

21 So, we can see here "What does it mean that
22 the presentation information is based on second
23 information," lines 7 through 9. That language is right
24 from the '745 patent, claim 1.

01:24PM

25 THE COURT: Let me hear from the defendant

1 their response on the relevancy and 403 objection.

2 MR. SHIELD: First, your Honor, it's the
3 inventors; and all the inventors testified that they had
4 only seen the '745 patent. They hadn't reviewed the
01:24PM 5 others; they didn't know about it. So, these claims are
6 the only ones we can ask about to understand what their
7 invention is. The inventors were asked what their
8 invention is so that we can understand what the scope is
9 supposed to be properly and the invention can be
01:25PM 10 explained to the jury.

11 The problem is -- and it really goes to an
12 enablement issue -- the inventors didn't understand their
13 claims; and they talk about, "Well, in my computer" --
14 we'll have probably several of these today. "As a
01:25PM 15 computer programmer, I've never seen these terms.
16 They're not used regularly." And those all go to
17 enablement issues that are, you know, at issue with
18 invalidity.

19 THE COURT: Why does it matter whether the
01:25PM 20 inventors understand all the language in the claims?

21 MR. SHIELD: Well, the inventors are supposed
22 to sign an oath saying that they understand what their
23 invention is when it's filed with the patent office and
24 that they possess their invention.

01:25PM 25 THE COURT: Well, but the inventors aren't on

1 trial here.

2 MR. SHIELD: Right, but the inventors who were
3 involved with filing the application -- if it was -- they
4 didn't possess it at the time they filed it, that's an
5 enablement issue.

01:25PM

6 THE COURT: Isn't enablement whether or not it
7 is set forth in the specification?

8 MR. SHIELD: Correct, that the claims can be
9 understood by a person of skill in the art based on the
10 specification. The inventors should know more about
11 their invention than anyone because they had the
12 knowledge that went into the specification and the
13 claims. So, when the inventors have no understanding of
14 their claims or what's in their patent, it goes to
15 whether or not the patent adequately discloses to the
16 public what their invention is.

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01:26PM

17 THE COURT: And can you cite me any law that
18 says if an inventor doesn't understand the language of
19 the claims, that the invention is not enabled?

01:26PM

20 MR. SHIELD: Well, it's actually relied upon
21 by our experts, your Honor, related to invalidity issues.
22 And part of what they're talking about is their skill in
23 the art and they're talking about the fact that the
24 inventors who also are skilled in the art, according to
25 the plaintiff's definition of a person of ordinary skill

01:27PM

1 in the art, whether or not they understood it. So, it's
2 not our expert saying, "I don't understand what it is.
3 I'm skilled in the art." It's actually looking at --
4 these are the inventors. So, it's not just me, an
5 expert. If the inventors didn't understand what it was,
6 it wasn't adequately disclosed to the public to show that
7 they possessed their invention.

01:27PM

8 THE COURT: All right. And do you have any
9 case law that you think is particularly pertinent to
10 testimony of an inventor with respect to the enablement
11 issue?

01:27PM

12 MR. SHIELD: No, your Honor, we don't have it
13 with us. I'm sorry. We can brief that issue for you,
14 though.

01:28PM

15 THE COURT: That's all right. I just wondered
16 if you did.

17 Let me let Mr. Quigley respond.

18 MR. QUIGLEY: I mean, as your Honor I think
19 caught on, the issue of enablement is reading the
20 specification, not an inventor who hasn't read the patent
21 or been involved with Droplets for 15 years and whether
22 they can look at the claim language in isolation and tell
23 the defendants' attorneys what that claim language means.
24 I mean, as many of these inventors testified and as that
25 quote from Mr. Baskin I showed earlier said, he didn't

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1 have any involvement in the prosecution. You know, just
2 as in claim construction, inventor testimony is extrinsic
3 evidence. Here, you know, that evidence that they're
4 trying to present is going to be misleading; and the jury
5 isn't going to understand that those inventors aren't
6 required to know what every term in the patent means 15
7 years after the patent was filed.

01:28PM

8 THE COURT: Mr. Shield.

9 MR. SHIELD: There's another issue with a
10 couple of the inventors, your Honor. Mr. Baskin is a
11 stock owner in Droplets and he stands to gain money if
12 Droplets is successful and there is deposition testimony
13 related to that fact. So, they're an admission against
14 interest, also.

01:28PM

15 THE COURT: That certainly addresses a hearsay
16 objection, but it doesn't address relevance. I don't see
17 a hearsay objection; so, I don't think we need to go to
18 whether or not it's an admission.

01:29PM

19 I do not see any relevance of this testimony
20 to an enablement defense. So, I'm going to sustain the
21 plaintiff's objection.

01:30PM

22 MR. QUIGLEY: Your Honor, in order to
23 short-circuit a number of our objections, we think
24 that -- there's a bucket here with these types of
25 questions and answers regarding claim terms. We would

01:31PM

1 suggest that the Baskin testimony -- if you'd like for me
2 to list it, I can list it and defendants can tell me if
3 they disagree with my bucket.

01:31PM

4 THE COURT: Well, let's go on to the next one
5 at least so we can make sure.

6 MR. QUIGLEY: Sure. So, if we can just
7 continue, Mr. Diaz, down 173-07. There's more in that
8 passage, through 174-21.

01:31PM

9 You can see line 21, page 173, "Do you know
10 how the presentation information is based on an operating
11 environment?" Again this is claim language they're
12 asking the inventor about.

01:32PM

13 And here, "If you look to the next limitation
14 in claim 1, it discusses presenting the fourth
15 information. Do you see that?"

01:32PM

16 MR. BARR: Your Honor, we agree that this
17 particular one is similar to your last ruling. So, this
18 one is -- we don't agree that there's a bucket that
19 applies to all of these, but this particular one is
20 similar to the last one. So, I think the ruling would be
21 the same on this particular one. But we would like to
22 take each one of them up because we think there is a
23 difference between the questions where we asked the
24 inventor to describe what his invention is without
25 relation to claim terms and the questions where we talk

01:32PM

1 about claim terms specifically.

2 THE COURT: All right. So, tell me: Of your
3 designations that are objected to within the range of
4 page 173 to 181, which ones do you want to separately
5 address?

01:32PM

6 MR. SHIELD: 180-10 to 181 -- or actually
7 181-10 to 181-21.

8 MR. QUIGLEY: I think you're right, 181-10
9 through 181-21.

01:33PM

10 THE COURT: All right.

11 MR. QUIGLEY: If you could blow this up,
12 Mr. Diaz.

13 You can see here line 10, "Would you agree
14 that both JavaScript and VBScript are not what is claimed
15 by your invention?" Again they're asking the inventor
16 questions about what is in the claims. The claims have
17 been construed, your Honor. We have experts that are
18 going to be at trial talking about it. We don't think
19 that it's appropriate to have an inventor that hasn't
20 read these claims in more than a decade and that didn't
21 draft the patent application testifying about what the
22 claim means and what it covers.

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23 MR. BARR: These specific questions have
24 nothing to do with the claim terms. The words
25 "JavaScript" and "VBScript" are not in the claims. This

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1 goes to the heart of what he understood his invention
2 was. And the problem we have in this case is that we
3 believe that Droplets is arguing that this invention is
4 something that it's not. And, so, the evidence from the
5 inventors, especially an inventor who is an interested
6 party, as to what is and is not what he thought his
7 invention was, we do believe is relevant and is going to
8 be relevant to whether or not there's infringement in
9 this case. So, this particular question and these others
10 I believe that we've just cited are not questions asking
11 about claim terms like the prior set that the court
12 looked at. These deal with a broader question of whether
13 you understand what your invention encompassed.

01:34PM

14 MR. QUIGLEY: I'd just point out that I
15 disagree. It mentions what is claimed, not just what is
16 your invention. We have no problem and we didn't object
17 to a number of questions about what is your invention, is
18 your invention JavaScript, but not is what is claimed
19 JavaScript.

01:34PM

20 MR. BARR: Well, obviously what is claimed is
21 what the invention is. So -- and I think you can easily
22 and everyone can easily tell what is a word that appears
23 in the claims and what is not. And the words

01:35PM

24 "JavaScript" and "VBScript" do not appear in the claims
25 and we don't believe that they are part of the invention

1 and that's what the inventors agreed as well. But that's
2 not what's being argued in this case.

3 So, we could have -- I guess the word
4 "claimed" by your invention, but that's the same as
01:35PM 5 saying that is what your invention is. The claims define
6 the invention. But that doesn't mean that because
7 something is the invention that it is a question about a
8 claim term, because these are not claim terms.

9 THE COURT: All right. Mr. Quigley, tell me:
01:35PM 10 Do you intend to represent to the jury that JavaScript
11 and VBScript are covered by your claims?

12 MR. QUIGLEY: I don't think we intend that --
13 you know, that Droplets invented JavaScript. There may
14 be implementations of JavaScript web applications that
01:35PM 15 are accused in this case, but that's a different issue.

16 THE COURT: Well, and, so, why does this
17 matter, is I guess what I'm trying to figure out.

18 MR. QUIGLEY: Referring to the claim language
19 again and what the claim language covers. The claim
01:36PM 20 language already says what it covers.

21 THE COURT: Well, if this -- instead of saying
22 "is not what is claimed," if it said "is not what you
23 invented"?

24 MR. QUIGLEY: I'm confident they did ask that
01:36PM 25 question and we did not object to that. In the depo

1 designations they asked the inventors "Did you invent
2 JavaScript," "Did you invent HTML," "Did you invent web
3 browsers?" All of those questions are littered
4 throughout these depo designations, and those aren't
5 objected to.

01:36PM

6 THE COURT: And I don't think that whether the
7 word "claimed" is in there or not matters, and I'm not
8 going to sustain the objection on that one.

9 What's next?

01:36PM

10 MR. QUIGLEY: Line 15, asking (reading) is it
11 correct that the presentation client is not HTML. It's
12 on this slide right here. "Presentation client" is a
13 claim term.

14 MR. BARR: That one, your Honor, is a claim
15 term; and we will agree that's covered by your prior
16 ruling.

01:37PM

17 THE COURT: All right.

18 MR. QUIGLEY: So, 181-10 to 14 would come in
19 but not 181-15 to 21.

01:37PM

20 MR. BARR: Through 19.

21 MR. QUIGLEY: 19?

22 MR. BARR: 19. The next one is the next
23 question.

24 THE COURT: So, 181-15 through 18 is out.

01:37PM

25 MR. QUIGLEY: 19, your Honor, I believe.

1 MR. SHIELD: It's 19.

2 THE COURT: Oh, yes, 19. I'm sorry.

3 I don't know why, but the -- in the chart of
4 343-2 there, the line numbers are off a little bit from
5 what the transcript appears to be.

01:37PM

6 MR. BARR: We'll double-check that, your
7 Honor. I don't know which draft is used. We'll make
8 sure it's fixed by the time these things get played.

9 THE COURT: Just so the record is clear, what
10 we're talking about eliminating is the question that
11 starts at 181-15 through the answer on 19.

01:38PM

12 MR. QUIGLEY: Yes, your Honor.

13 THE COURT: Okay.

14 MR. QUIGLEY: That's all we have for
15 Mr. Baskin.

01:38PM

16 There are no objections to Mr. Berberian, the
17 next witness designated.

18 And then with respect to Mr. Blonder, the
19 first testimony that we have an objection to begins on
20 page 130, line 7; and it goes through 131, line 21. And
21 basically this testimony here, he's being handed an
22 e-mail that's the e-mail that defendants I think either
23 withdrew or they had said on Tuesday would be used only
24 for equitable issues, previously DTX-24.

01:38PM

25 MR. SHIELD: This is an equitable issue.

01:39PM

1 MR. QUIGLEY: So, we can agree to withdraw
2 130, line 7, through 131, line 21?

3 MR. SHIELD: It will be only an equitable
4 issue. It will be withdrawn from the jury.

01:39PM

5 MR. BARR: We need to be able to offer it when
6 we make our equitable case.

7 THE COURT: That's fine. But it just won't be
8 played for the jury.

9 MR. BARR: Yes, your Honor.

01:39PM

10 THE COURT: All right.

11 MR. QUIGLEY: Just to make it clear, page 130,
12 line 7, of Dr. Blonder's testimony through line 21 at
13 page 131 won't be played in front of the jury.

14 MR. SHIELD: That's correct.

01:39PM

15 MR. QUIGLEY: And the next objection to
16 Mr. Blonder is line 8 of page 148, begins there; and this
17 testimony goes through page 152 -- sorry -- 153, line 7.
18 It's kind of long, but it's all related. This is about
19 what was previously DTX-28 which defendants withdrew, I
20 believe; and this is an article by Mr. Blonder, saying
21 not-so-nice things about the patent office.

01:40PM

22 MR. SHIELD: We'll drop those.

23 MR. BARR: By the way, I don't agree with that
24 characterization of the article but we have pulled that
25 exhibit and, so, we don't need that testimony.

01:40PM

1 THE COURT: So, that would be the designations
2 that ran in page 148 through page 153?

3 MR. QUIGLEY: Yes, your Honor.

4 THE COURT: Okay. Those will be withdrawn.

01:40PM

5 MR. QUIGLEY: I believe that's it for
6 Dr. Blonder.

7 There are no objections to Mr. Brittan.

8 Mr. Bulkin is the next witness. And if we
9 could have page 79 of Mr. Bulkin's testimony, line 22.

01:41PM

10 So, here they're setting up that Mr. Bulkin
11 has been a web developer or software developer for 20
12 years.

13 And, Mr. Diaz, if we can go to the next page.

14 MR. BARR: Your Honor, I think part of these
01:41PM 15 questions do go under the court's prior ruling about
16 claim terms. So, I think part of it -- and Mr. Shield
17 will tell you what part -- we're willing to withdraw
18 pursuant to your prior ruling.

19 THE COURT: Well, if -- would it be helpful if
01:41PM 20 we give you a chance to -- if there are others here, I
21 can give you a few minutes to see if you can agree on how
22 that will play out; and we'll just come back and take up
23 the ones that you disagree with about.

24 MR. BARR: That's a great idea, your Honor.

01:42PM

25 THE COURT: All right. Then we will check on

1 you in a few minutes. Thank you.

2 (Recess, 1:42 p.m. to 2:09 p.m.)

3 THE COURT: Mr. Quigley.

4 MR. QUIGLEY: We were successful in resolving
02:09PM 5 all but two or three of objections to defendants'
6 designations.

7 Just for the record, defendants are dropping
8 for Mr. Bulkin -- sorry. I'll go earlier in time.
9 Droplets is dropping its objections to page 79, line 22.

02:09PM 10 THE COURT: Is this about Mr. Bulkin?

11 MR. QUIGLEY: Mr. Bulkin.

12 THE COURT: Okay.

13 MR. QUIGLEY: So, page 79, line 22, to
14 page 80, line 8 -- we got to cut that in half kind of.

02:09PM 15 We're going to drop our objection to page 79, line 22,
16 through page 80, line 4; and defendants have agreed to
17 drop their designation for page 80, line 5 through
18 line 8.

19 THE COURT: Okay.

02:10PM 20 MR. QUIGLEY: Plaintiff is dropping its
21 objection to page 85, line 23, through page 87, line 4.

22 THE COURT: All right.

23 MR. QUIGLEY: Defendants are dropping their
24 designation for page 101, line 19, through 102, line 12.

02:10PM 25 THE COURT: All right.

1 MR. QUIGLEY: I believe defendants are
2 dropping their designations for page 125, lines 6 through
3 11, and page 131, lines 14 through 16.

4 THE COURT: All right.

02:10PM

5 MR. QUIGLEY: And then it's going to get kind
6 of interesting here. Defendants are going to drop their
7 designations beginning on page 160, line 22, through
8 167-16. And now there is still going to be a dispute as
9 to line -- sorry -- page 167, line -- I have 16 through

02:11PM

10 23, but that must not be it.

11 MR. SHIELD: No, that's it.

12 MR. QUIGLEY: 16 through 23 is where there's a
13 dispute.

02:11PM

14 And then page 169-7 to 12 there's also a
15 dispute.

16 If we could have, Mr. Diaz, from the Bulkin
17 deposition, page 167, lines 16 to 23.

02:12PM

18 So, here Mr. Bulkin is being asked if just
19 looking at the claims he could build the invention. We
20 just don't think that's a proper question if trying to
21 ask the enablement or trying to ask indefiniteness -- or
22 make an indefiniteness argument, asking the inventor if
23 looking at the claims in the abstract whether they can
24 build the invention. The question is if you can look at
25 the spec, everything a person of ordinary skill in the

02:12PM

1 art knew at the time, and looking at the claims would
2 have enabled the invention. We just don't think that's
3 the question being asked here.

02:12PM 4 MR. SHIELD: This is an interesting one, your
5 Honor, because we've talked about removing all of this
6 discussion about the claims and what he understood about
7 his claims because they're claim terms, and this is
8 actually kind of a cumulation. So, they kind of wanted
9 to keep out any discussion of them actually talking about
02:13PM 10 the claims but he's specifically being asked here as an
11 inventor, having looked at his claims, could he build his
12 invention. It's not asking what a claim means. It's
13 just asking could he as an inventor reading his claims
14 understand his invention.

02:13PM 15 THE COURT: All right. And is "he" someone
16 who is being offered as an expert in this field?

17 MR. SHIELD: He's not an expert. He's an
18 inventor. And an inventor presumptively has the
19 knowledge of how to practice their patent.

02:13PM 20 MR. BARR: And, your Honor, as I understand
21 it -- and I'm sure one of these technical guys will
22 correct me if I'm wrong -- but it's the person with
23 ordinary skill in the art that's supposed to be able to
24 build the invention and I believe that certainly this
02:13PM 25 inventor meets the definition of a person with ordinary

1 skill in the art. We can go back and look at his
2 qualifications and education, but I believe here that
3 it's a fairly low bar that the plaintiffs have set as a
4 person of ordinary skill. And I don't believe that's
5 their objection to this designation.

02:14PM

6 THE COURT: It relates to the relevance in
7 that whether or not this individual thinks that this
8 particular claim defines a system that he could build.
9 Has a lot to do with why should the jury care.

02:14PM

10 MR. QUIGLEY: If, your Honor, I could point
11 out that the inventor is sitting here being asked the
12 question with the claims in isolation and the relevant
13 question is when considering the specification as a
14 whole, not when just looking at a claim from a patent
15 whether you can build it.

02:14PM

16 THE COURT: Well, there's nothing in the
17 question that limits him to consideration of the claim.

18 MR. SHIELD: And, your Honor, we could
19 actually go through the testimony. We went through and
20 walked through the specification where he, you know, read
21 it; and I asked him, "Did that portion of the
22 specification help you understand it any better?" So, it
23 wasn't in pure isolation.

02:15PM

24 MR. BARR: I think the reason -- to answer
25 your question, your Honor, why does the jury care, I

02:15PM

1 think it matters because the plaintiff's expert
2 Dr. Martin opines that anyone with a bachelor's degree in
3 computer science is a person with ordinary skill in the
4 art and would know how to build these features if they
02:15PM 5 looked at the patent; and here we have someone who meets
6 that definition who said -- and is in fact one of the
7 inventors who says that he could not do so. So, we
8 believe that that rebuts that testimony; and that's why
9 we think that it's relevant.

02:16PM 10 THE COURT: My concern with it, Mr. Shield and
11 Mr. Barr, is that I think inventor testimony is subject
12 to considerable abuse. It carries the risk of unfair
13 weight in front of the jury, and it -- I understand you
14 are offering this as relevant to an enablement defense?

02:17PM 15 MR. BARR: It's relevant to an enablement
16 defense. It's also relevant to whether or not these
17 patents, you know, that they're -- the plaintiffs have
18 asserted that these patents -- their expert is going to
19 say that anyone with a bachelor's degree in computer
02:17PM 20 science looking at these patents can build the accused
21 systems; and the reason they have to say that is because
22 the specifics of building the accused feature such as
23 search suggest everyone admits are not in the patent.
24 So, there's a lot of things that are not in these patents
02:17PM 25 that they need in order to build these systems. So,

1 that's his testimony that anyone with a bachelor's degree
2 in computer science knows everything they need to know to
3 build it if they see these patents. So, that's that
4 issue.

02:17PM

5 As to the inventor testimony, of course I
6 agree with the court there's case law talking about
7 inventor testimony. However, I think this generally
8 applies when it's being used by the patentee to try to
9 use it offensively against the defendant. Here we're

02:18PM

10 using the inventor testimony against the patentee; and I
11 believe that's a different analysis because, you know,
12 they're not using their own person to abuse the system.
13 We're using it against them.

02:18PM

14 MR. SHIELD: To clarify, your Honor,
15 Mr. Barr's point, usually what happens with inventors is
16 they say they invented more than what's described in the
17 patent.

02:18PM

18 THE COURT: I understand that there are
19 differences in the direction in which it's being used,
20 but the concerns are similar.

21 MR. QUIGLEY: At least with respect to claim
22 construction, inventor testimony, whether it favors the
23 patentee or disfavors the patentee, is still considered
24 extrinsic and is still considered less than helpful.

02:18PM

25 THE COURT: And this is not really a claim

1 construction issue *per se* but, rather, one of enablement.
2 As I understand the test for enablement, it involves the
3 specification and whether or not it provides sufficient
4 description that one of ordinary skill in the art could
5 take and build with an acceptable degree of
6 experimentation; and this question is much more confined
7 than that.

02:19PM

8 MR. BARR: And, your Honor, that's again I
9 think the second -- well, one of the arguments is
10 enablement. The other relates to the infringement
11 argument that they have made and that is that just the
12 knowledge of a person with a bachelor's degree in
13 computer science supplies the other pieces that are
14 needed to build the accused features with the patents.

02:19PM

15 So, that's what -- this also has value to us for that
16 purpose.

02:20PM

17 THE COURT: How does that relate to
18 infringement?

19 MR. BARR: Because we have argued that the
20 patents do not teach -- we don't infringe for a number of
21 reasons, one being that these patents don't cover the
22 features, they don't teach you how to build these
23 features and whether the plaintiff is trying to fill that
24 void by saying through their expert that a person
25 graduating from college with a bachelor's degree in

02:20PM

02:20PM

1 computer science already has the missing pieces
2 necessarily to know how to build a search suggest
3 feature, an add to cart feature; so, therefore, if they
4 just look at the patent, they'll have everything they
5 need to know to build the system. So, that's the other
6 piece in this, your Honor.

02:20PM

7 THE COURT: I want to look at Mr. Bulkin's
8 testimony in more detail before ruling on this. Do you
9 have a copy of the transcript that you can leave with me?

02:20PM

10 MR. BARR: I'm sure we do.

11 MR. BUDWIN: I have one, your Honor. If I may
12 approach.

13 THE COURT: Okay. If you would hand that to
14 Ms. Andrews.

02:21PM

15 MR. QUIGLEY: It does have some coloring party
16 designations in it but...

17 THE COURT: That's fine.

18 All right. We'll pass this one for now.

19 MR. SHIELD: I believe our next dispute is

02:21PM

20 also on the same issue as that. It's at lines -- 169-7
21 to roughly 169-12.

22 THE COURT: All right. I'll look at both of
23 the 167 and 169 offerings.

24 MR. QUIGLEY: And I believe, your Honor -- let

02:21PM

25 me get my list back out. Defendants are dropping their

1 designations for Mr. Bulkin beginning on page 70,
2 line 23, through page 172, line 2.

3 MR. SHIELD: Actually line 15.

4 MR. QUIGLEY: Oh, all the way through 15.

02:22PM

5 Okay.

6 MR. SHIELD: I'm sorry. You read it right.

7 I'm sorry. I read it wrong.

8 MR. QUIGLEY: They're dropping page 170,
9 line 23, through page 172, line 2.

02:22PM

10 THE COURT: Okay.

11 MR. QUIGLEY: The next witness, your Honor, is
12 Mr. Cunningham. And defendants are dropping their
13 designation for Mr. Cunningham beginning on page 70,
14 line 7, through line 1 of page 74.

02:22PM

15 THE COURT: All right.

16 MR. QUIGLEY: And then defendants are dropping
17 their designated testimony from page 76, line 16, through
18 page 84, line 14.

02:23PM

19 And I just want to point out for the court
20 here that there is a mistake in the designation. If you
21 look on page 16, I believe it is, it says page 83,
22 line 1, through page 86, line 16. That should actually
23 be page 84, line 16.

24 THE COURT: Okay.

02:23PM

25 MR. QUIGLEY: So, they're dropping their

1 designation through page 84, line 14; but they're keeping
2 their designation from 84, line 15 through line 16, with
3 no objections.

4 THE COURT: What about 18 through 24?

02:23PM

5 MR. QUIGLEY: I don't believe there is an
6 objection to 18 through 24.

7 THE COURT: Okay.

8 MR. QUIGLEY: Sorry. Mr. Shield has a
9 correction.

02:23PM

10 MR. SHIELD: Actually 18 through 24 goes
11 actually to 85-2. We looked at that to make sure the
12 answer was included. So, 84-18 through 85-2.

13 THE COURT: And 84-15 and 16 are also in?

14 MR. SHIELD: Yes, sir.

02:24PM

15 THE COURT: What about 17?

16 MR. SHIELD: It's an objection.

17 THE COURT: Okay.

18 MR. QUIGLEY: And then beginning on page 93,
19 line 17, through page 94, line 16, defendants are
20 dropping those designations.

02:24PM

21 Defendants are also dropping page 108,
22 line 23, through page 109 -- sorry.

23 THE COURT: Let me see. What -- we left off
24 at 84. I see objections at pages 93 and 94. What's

02:24PM

25 happening with those?

1 MR. QUIGLEY: 93 and 94, those designations
2 are being dropped.

3 THE COURT: Okay.

4 MR. QUIGLEY: I'm sorry, your Honor.

02:24PM

5 THE COURT: All right. Go ahead.

6 MR. QUIGLEY: So, from page 93, line 17,
7 through page 94, line 16, those are the designations that
8 are being dropped.

9 THE COURT: Okay.

02:25PM

10 MR. QUIGLEY: And then page 108, line 23,
11 through page 110, line 12 -- through 109-8. I'm sorry.

12 MR. SHIELD: It's 108-23 to 109-8.

13 MR. QUIGLEY: Those are being -- the
14 designations are being dropped.

02:25PM

15 MR. SHIELD: And then Droplets is dropping its
16 objection to 109-19.

17 And then defendants are dropping 110-13 to
18 110-22.

02:25PM

19 And just for the record, your Honor, all of
20 these are being dropped pursuant to your previous ruling.

21 THE COURT: Okay.

22 MR. QUIGLEY: So, that takes care of
23 Mr. Cunningham.

02:26PM

24 Mr. Franco is next, and he doesn't have any
25 non-106 objections which we've already discussed.

1 I believe there's no objection for Goyal,
2 for -- I can't say Veera's name.

3 MR. SHIELD: That's Mr. Sekhar.

4 MR. QUIGLEY: Mr. Sekhar.

02:26PM

5 Mr. Lifka, defendants have included a number
6 of designations. As your Honor will remember, I think
7 Mr. Lifka has been excluded; so, plaintiffs just
8 generally object to any of Mr. Lifka's testimony being
9 designated and played for the jury.

02:26PM

10 MR. BARR: And, your Honor, this was the issue
11 where the *in limine* -- the plaintiffs had requested some
12 additional documents to be produced and some additional
13 witnesses to talk about those documents, and we did that.
14 We produced the documents and the witnesses. And then

02:26PM

15 *in limine* -- this is Ms. Nair and Mr. Lifka -- the
16 plaintiffs objected that the witnesses should not be able
17 to be used, even though they're going to use the
18 documents, because the witnesses were not listed in the
19 initial disclosures.

02:27PM

20 Of course we did list them in the -- they
21 weren't in the initial disclosures because we didn't
22 think about them until the plaintiffs said they wanted
23 them but -- at that hearing later and then of course we
24 did list them in our pretrial order and they were listed

02:27PM

25 long more than 30 days before trial as well as deposed.

1 The court excluded those and issued an order.
2 We did file objection to that order which -- on that
3 issue, the exclusion of those two witnesses; and that's
4 pending in front of Judge Gilstrap. But we went ahead
02:27PM 5 and put -- these are the depos we would use if we get to
6 use the witnesses.

7 THE COURT: All right. Well, I -- then those
8 will be ruled on by Judge Gilstrap in connection with
9 your objection.

02:27PM 10 MR. QUIGLEY: Nothing for Moore.

11 The same issue for Ms. Nair.

12 And I will note that I think it was actually
13 in the joint pretrial order that Droplets raised the
14 issue of Mr. Lifka and Ms. Nair, not in the motion
02:28PM 15 *in limine*; but your Honor still ruled.

16 Mr. Rose, there's no objections.

17 And the last substantive objection that we
18 have to deal with of Droplets is Dr. Theuerkauf's
19 deposition, page 81, line 23, through page 82, line 6.

02:28PM 20 So, this testimony here beginning on page 81,
21 line 23, is asking Mr. Theuerkauf whether he has ever
22 been to Marshall before; and I don't think Mr. Theuerkauf
23 has ever represented that he has been or that he has
24 significant ties to Marshall.

02:29PM 25 And, Mr. Diaz, if you can pull up the motion

1 *in limine* ruling, Plaintiff's No. 7.

2 Now, as your Honor stated here in the middle,
3 when Droplets requested that essentially defendants not
4 be allowed to ask about whether Droplets' witnesses had
02:29PM 5 been to Marshall, your Honor stated it was granted but
6 "Further, this *limine* shall not prevent defendants from
7 probing into a particular witness' connections to
8 Marshall, Texas, if the witness so represents such
9 connections." And Dr. Theuerkauf hasn't represented such
02:29PM 10 connections; so, we don't believe designating testimony
11 simply asking him if he has ever been to Marshall is
12 appropriate.

13 MR. BARR: And of course the court can read
14 the *limine*, and it was not that we can't inquire into
02:30PM 15 Marshall. They requested that we not say that they filed
16 in Marshall for an improper or underhanded purpose, which
17 of course that's not what we're asking him.

18 THE COURT: What's the relevance of the
19 question if not to indicate that he has no connection to
02:30PM 20 the place he's filed suit?

21 MR. BARR: Sure. Well, the relevance is that,
22 you know, of course my client Sears is from Chicago and
23 Overstock is from Salt Lake City and that's going to be
24 evident to the jury and, so, if -- Mr. Theuerkauf here is
02:30PM 25 going to be testifying, I assume by deposition since

1 we're talking about this, and we want to point out that
2 Droplets is not a local company and, so, they can't say
3 that "These guys are out of state, and we're local."

02:30PM

4 THE COURT: Well, isn't there a question that
5 asks him where he lives or works or where he's from?

02:31PM

6 MR. BARR: There is a question that asks him
7 that; but, of course, he's an employee of this company.
8 And I believe that there -- in fairness, there may be a
9 question asking where they're from, which I think is
10 Plano but...

02:31PM

11 THE COURT: Yeah. I believe that that
12 question is what this *in limine* was designed to avoid.
13 If they've opened the door by implying that he's from
14 Marshall, then I have no problem with your asking that
15 but I don't think that -- from what I'm hearing and from
16 what I'm not hearing from you, I don't think there's
17 anything in his testimony to imply that he has a
18 connection to Marshall, is there?

02:31PM

19 MR. BARR: I don't believe so. And I want to
20 make it clear I'm not implying that there's any problem
21 with filing in Marshall. I'm from Tyler myself. But I
22 just wanted to inquire as to everybody's connections with
23 the venue.

02:31PM

24 THE COURT: Well, I think what this is
25 designed to allow is you to ask anybody where they're

1 from but not to imply that they have no connection to
2 Marshall and certainly this question which says "before
3 you filed suit in Marshall" which definitely draws a
4 relationship between the filing of the suit and his lack
5 of connection. So, I'll sustain that objection.

02:32PM

6 MR. BARR: Thank you, your Honor.

7 MR. QUIGLEY: And that is the totality of
8 plaintiff's objections, your Honor.

9 THE COURT: All right.

02:32PM

10 MR. SHIELD: Let's take up the defendants'
11 objections to the plaintiff's designations.

12 Your Honor, we only have two objections to
13 plaintiff's designations. The first one is -- they're
14 both for Mr. Goyal, an Overstock employee. The first one
15 is at page 61, line 18, to 62-1.

02:32PM

16 The question from Ms. Albert to Mr. Goyal, an
17 employee of Overstock, is "Do you believe that holders of
18 valid infringed patents should be paid a reasonable
19 royalty?" Mr. Goyal isn't being offered by Overstock for
20 an expert. They haven't designated him as an expert.

02:34PM

21 They have not laid any foundation he has any special
22 training in what patents are, what reasonable royalties
23 are, et cetera, and this is highly prejudicial and
24 irrelevant and if it's played for the jury, it's going
25 to, you know, give a misleading impression regarding

02:34PM

1 Overstock's position in this case.

2 THE COURT: Tell me about that. What --
3 what's the prejudicial nature of it?

02:34PM

4 MR. SHIELD: Well, they're asking about
5 patents and reasonable royalties to be paid. He has no
6 training in it. They've not laid a foundation that he
7 would even be able to answer the question. So, they're
8 offering it as an improper opinion. It's legal
9 conclusions, and it's going to --

02:34PM

10 Sorry, John.

02:35PM

11 MR. BARR: I was just going to say, your
12 Honor, to answer your question, I don't think it's a
13 prejudice issue. It's more that this is a technical
14 witness from Overstock, and they're asking him about his
15 personal opinion. He was being a 30(b)(6) deposition, I
16 believe; and they're asking about his personal opinion
17 about holders of valid infringed patents. It has no
18 relevance, what he thinks about that.

02:35PM

19 THE COURT: Okay. I don't see it as
20 prejudicial, but I do see it as somewhat argumentative to
21 be -- as to a 30(b)(6) witness. I'll sustain that
22 objection.

02:36PM

23 MR. SHIELD: And then the second one is on
24 page 69, line 22. It ends on 71 where he says "No."

25 Mr. Goyal was asked if he is aware of any

1 non-infringing alternatives or substitutes for the
2 inventions of the claimed patents-in-suit. The question
3 itself has several issues because they're asking someone
4 who testified during his deposition that he never read
5 the patents, he, you know, hadn't -- he's not ever filed
6 a patent. And it's once again seeking an opinion from a
7 lay witness regarding non-infringing alternatives when he
8 does not understand what's even being asked of him.

9 THE COURT: He's a corporate representative?

10 MR. BARR: He is a corporate representative on
11 certain designated issues but he has never read these
12 patents and he's not a lawyer and he has not done any
13 study of the patents. He's here to testify about how
14 Overstock's website works.

15 THE COURT: Well, let me just find out if the
16 plaintiffs maintain that this question falls within one
17 of the designated topics for the 30(b)(6) deposition.

18 Ms. Albert.

19 MS. ALBERT: Thank you, your Honor.

20 First I'd clarify that Mr. Goyal was -- one,
21 was, contrary to what was said earlier, designated as
22 both a 30(b)(6) and a 30(b)(1) deponent. But more to the
23 point, Ms. Salters, defendants' damages expert, opines
24 that there are abundant non-infringing alternatives
25 available; and she cites Mr. Goyal's testimony as one of

1 the references that she considered. The fact that there
2 is testimony from Overstock from a -- from the designer
3 of their entire website that --

02:37PM

4 MR. SHIELD: Can you just show what you say
5 she cited?

6 MS. ALBERT: Will you please pull up the
7 references cited, Mr. Diaz?

8 THE COURT: Is there something on there that
9 refers to this?

02:38PM

10 MS. ALBERT: Yes, your Honor. Ms. Salters
11 relies on Mr. Goyal as one of the references she
12 considers for her expert report. In that expert report
13 she puts forth testimony that is directly contrary to the
14 testimony here.

02:38PM

15 THE COURT: Okay. I'm -- I'm not sure why you
16 just put the last exhibit up. I was not able to --

17 MS. ALBERT: That wasn't the right page. I'm
18 sorry, your Honor.

19 THE COURT: All right.

02:38PM

20 MR. BARR: Your Honor, it sounds like the
21 issue here is that Ms. Salters, as a damages expert, has
22 attached to her report, as required by the rules, all the
23 materials that she reviewed in connection with her work
24 on the case; and she reviewed, I think, all the

02:38PM

25 depositions. There is not, that I'm aware of -- and I'm

1 sure counsel will correct me if I'm wrong -- anything in
2 Ms. Salters' report or anybody else's that relies on
3 Mr. Goyal's testimony related to non-infringing
4 alternatives. Certainly she looked at Mr. Goyal's
5 testimony but --

02:39PM

6 THE COURT: Well, let me ask -- back to the
7 question I posed originally, Ms. Albert, is there
8 anything in the 30(b)(6) topics that covers the subject
9 of that question?

02:39PM

10 MS. ALBERT: No, your Honor.

11 THE COURT: So, you're not relying upon his
12 being a 30(b)(6) representative. You're saying that
13 you're relying upon his status as a responsible employee
14 of the defendant for that area?

02:39PM

15 MS. ALBERT: Your Honor, he's a senior
16 director at Overstock; and he is responsible for the
17 design of the entire web page. He was designated as to
18 the workings of the accused features; and given his
19 position in the industry, he's in a perfect position to
20 know whether or not acceptable, viable, non-infringing
21 alternatives exist.

02:40PM

22 MR. BARR: Your Honor, Mr. Goyal testified,
23 first of all, that he had never read any of these
24 patents. To determine if acceptable, non-infringing
25 alternatives exist, he would have to read the patents and

02:40PM

1 look and see if there's non-infringing alternatives. He
2 said, "I've never seen the patents."

02:40PM

3 THE COURT: And tell me -- that's been on my
4 mind. Did Ms. Salters study the claims of the patents
5 before she testified about non-infringing alternatives?

02:40PM

6 MR. BARR: No. She relied on Mr. Gray, who is
7 one of the experts, who did do that and provided an
8 opinion about that, that she had talked to Mr. Gray. So,
9 Ms. Salters relies on Mr. Gray for whether or not there's
10 non-infringing alternatives, in addition to Ms. Salters'
11 relied on Mr. Theuerkauf who testified that the Adobe
12 Flex system was a -- was an infringing thing that was
13 licensed. But the issue here with Mr. Goyal is he's a
14 technical witness. He is not being offered to provide a
15 legal opinion about non-infringing alternatives, which is
16 exactly what that is.

02:41PM

02:41PM

17 So, earlier when we were talking about we
18 couldn't ask the inventors about what the claim terms
19 mean, how can we now ask another lay witness about what
20 the claims mean who is a third party and has never seen
21 the patents? It's certainly going to be confusing and
22 prejudicial to the jury, and they're asking for a
23 Rule 702 opinion from a lay witness as well.

02:41PM

24 THE COURT: The reason I made the reference to
25 Ms. Salters is because I have been struggling with the --

1 her apparent reliance to some degree on the theory that
2 any competitor who hasn't been sued is thereby a
3 non-infringing alternative.

02:42PM

4 MR. BARR: I don't believe that that is her
5 opinion. I believe that she talked to -- I don't have
6 her opinion in front of me. But I believe that she
7 talked to Mr. Gray who is an expert who did look at
8 non-infringing alternatives.

02:42PM

9 THE COURT: Good, because that's the way it
10 should work.

02:42PM

11 MR. BARR: And, also, your Honor, I think it's
12 very important that she mentioned several times she also
13 relied on Mr. Theuerkauf who is one of the plaintiff's --
14 CFO of the plaintiff who talked about that; and in
15 addition, there's documents that were produced by the
16 plaintiffs that talk about their opinion about other
17 alternatives are out there. I agree with the court, you
18 know, that certainly just -- just because someone hasn't
19 been sued doesn't necessarily mean that it's a
20 non-infringing alternative. But of course if there's
21 someone that hadn't been sued and they've analyzed their
22 product, then that might be a little more to it and might
23 help there so...

02:42PM

24 THE COURT: Yes.

02:42PM

25 MR. BARR: But as to Mr. Goyal, no one has --

1 he has not opined nor has anyone relied on any opinion
2 from him related to non-infringing alternatives or these
3 patents at all. He has only testified as to how
4 Overstock's website works.

02:43PM

5 MS. ALBERT: Your Honor, that is not the case.

6 THE COURT: Well, I think that -- given my
7 understanding of his role in the defendant, I think it's
8 a fair question. I think you can explain through other
9 means that there are other people who do have that
10 knowledge; but I think the plaintiff should be allowed to
11 ask somebody within the defendant company whether or not
12 they're aware of non-infringing alternatives. And if
13 you've got somebody else for the company who has spoken
14 to that, tell me about it.

02:43PM

15 MR. BARR: No one from the company has spoken
16 about that because we had -- no one from the company has
17 analyzed these patents which they'd never heard of until
18 they were sued. We have expert witnesses who are going
19 to talk about non-infringing alternatives. In order to
20 determine if there's non-infringing alternatives, you've
21 got to determine if there's infringement. No one from
22 the company has sat down -- and I'm not aware of any case
23 anywhere where it has said that a company is obligated to
24 do this -- is sit down and compare the claims to the
25 accused instrumentalities. We have experts that are

02:44PM

1 going to testify on that issue.

2 And, similarly, no one from the plaintiff is
3 testifying that there's infringement. They don't have
4 any of their witnesses -- their officers and executives,
02:44PM 5 none of them are testifying that we infringe. They're
6 relying on their experts for that purpose.

7 So, I think to allow a lay witness who has
8 testified in his very deposition when they asked him "Did
9 you look at any of these patents," he said, "No, I
02:44PM 10 haven't" and then to say, "Are you aware of any
11 non-infringing alternatives," he said, "No, I'm not,"
12 well, of course he doesn't know. If he doesn't know
13 what's infringing and he doesn't know what the patents
14 say, I don't see how he could have honestly said that
02:44PM 15 he's aware of a non-infringing alternative if he doesn't
16 know what an infringing issue is.

17 THE COURT: Well, I'd --

18 MS. ALBERT: Your Honor, let me -- excuse me.

19 THE COURT: I'd certainly say that is very
02:44PM 20 valid, you know, redirect for the witness; but I would
21 think that if -- if he is the one who would make the
22 decisions about what technology the defendants use in
23 their websites, I don't see how it could be improper to
24 ask him that question.

02:45PM 25 MR. BARR: Because he didn't make that

1 decision based on these patents. The testimony from
2 everyone, including plaintiffs, has been that these
3 patents were never raised until the lawsuits were filed.
4 And we're not obligated to give a witness -- a fact
02:45PM 5 witness patents and make him do an expert opinion which
6 he would not be qualified to do. He's not a lawyer.

7 THE COURT: All of which is an answer that he
8 can give to that question.

9 MR. BARR: I just think it's going to be
02:45PM 10 extremely confusing to the jury. If the guy sits up
11 there and says, "I'm not aware of any non-infringing
12 alternatives," they're going to take that to mean that
13 there are none when in fact he hasn't looked for
14 non-infringing alternatives because that wasn't something
02:45PM 15 he was tasked with or obligated to do either. So, that's
16 my point.

17 THE COURT: And if anybody had asked him that,
18 I would say that's admissible, too.

19 MR. BARR: I think it would be, but we -- but
02:45PM 20 he hasn't been asked to do that. That would be not his
21 function or his qualification. And it's implying that
22 there are none. The question is unfair because it
23 implies that this is not -- it assumes that he had an
24 obligation to do that and didn't, which he didn't have
02:46PM 25 and hasn't.

1 THE COURT: Well, I -- I don't think all of
2 that is built into the question. But in any event, I'm
3 going to overrule the objection to that testimony.

02:46PM

4 MR. BARR: Well, your Honor, in light of that
5 ruling, we'd ask to add in the -- to designate the
6 testimony from this witness where he's asked if he has
7 ever seen the patents and he responds that he has not and
8 has not studied the patents, so that way the -- at least
9 we could show that -- his basis for not knowing.

02:46PM

10 THE COURT: I'll allow you to designate that.

11 Does the plaintiff have anything else they
12 want to designate that relates to his knowledge base?

02:47PM

13 MR. BUDWIN: Your Honor, it would be nice if
14 we could see specifically what they're going to
15 designate. If it's literally just that question and
16 answer, I don't think there would be anything else.

17 So, just has he read the patents-in-suit
18 and...

02:47PM

19 No, that's acceptable with no further
20 counters.

21 THE COURT: Okay. So, what page and line are
22 we adding in?

23 MR. SHIELD: Page 9 of Mr. Goyal, line 19 to
24 line 22.

02:47PM

25 THE COURT: Okay. That's in.

1 All right. I carried the objections to
2 Mr. Bulkin on page 167 and 169. I'll take the transcript
3 and review it and get you the result on that promptly.

4 What else do we have?

02:47PM

5 MS. ALBERT: Nothing further from the
6 plaintiff, your Honor.

7 THE COURT: All right.

8 MR. SHIELD: Nothing further from the
9 defendants.

02:48PM

10 THE COURT: Very well. I think that this
11 afternoon you should be able to receive the jury lists.
12 Has anybody tried to get those yet?

13 MS. SMITH: We received it, your Honor.

14 THE COURT: Okay. Good. Very good.

02:48PM

15 All right. Thank you, and we're adjourned.

16 (Proceedings adjourned, 2:48 p.m.)

17

18 COURT REPORTER'S CERTIFICATION

19 I HEREBY CERTIFY THAT ON THIS DATE, JANUARY 8,
20 2015, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
21 RECORD OF PROCEEDINGS.

22

23

24

25

/s/
TONYA JACKSON, RPR-CRR